

SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

NOTICE OF APPROVAL

Notice is hereby given that the Supreme Judicial Court has approved and promulgated rules as further indicated below.

MARGARET MARSHALL

Chief Justice

1. Court Submitting Rules for Approval:

Probate and Family Court Department

2. Date Rules Submitted for Approval:

January 22, 2009

3. Date Approved and Promulgated by the Supreme Judicial Court:

April 1, 2009

4. Rules or Rules, or Amendments Thereto, Approved and Promulgated:

Amendments to Mass. R. Dom. Rel. P. 4 and 56;

Amendment to Supplemental Rule 410; and new Rule 27C,

General Rules of the Probate Court

Effective Date - May 1, 2009

(The original of this notice is to be filed in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and a copy to be sent by the Clerk to the court which requested approval of the rules.)



THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT
ADMINISTRATIVE OFFICE
TWO CENTER PLAZA, SUITE 210
BOSTON, MA 02108

PAULA M. CAREY
CHIEF JUSTICE

TEL: (617) 788-6600
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January 22, 2009

Honorable Roderick L. Ireland, Associate Justice
Supreme Judicial Court
John Adams Courthouse
Pemberton Square
Boston, MA 02108

Dear Justice Ireland :

I write to submit proposed changes to the Massachusetts Rules of Domestic Relations Procedure, the General Rules of the Probate Court and the Supplemental Rules of the Probate Court for approval by the Supreme Judicial Court in accordance with the provisions of G.L. c. 215, § 30.

These proposed changes were recommended by the Probate and Family Court Bench/Bar Committee on Rules. The proposed rules were published in Lawyers Weekly for comment and were also submitted to the justices of the Probate and Family Court for vote and our judges responded with a majority voting in favor of the adoption of the revised rules. The proposed changes are also being sent to Chief Justice Robert Mulligan for his review.

The rationale for each proposed change is contained in the Reporter's Notes following each rule. It is hoped that the rules, if approved, will become effective March 3, 2009. If you or the Court's staff have any questions or comments, I would be happy to discuss them with you. Thank you for your consideration.

Sincerely,

Paula M. Carey
Chief Justice

Enclosures

cc: Honorable Margaret H. Marshall, Chief Justice
Hon. Robert A. Mulligan, Chief Justice for Administration and Management
Hon. Geoffrey A. Wilson, Chair, Probate and Family Court Bench/Bar Rules Committee
Christine P. Burak, Esq.

Rule as amended:

Old language struck through, new language in italics

RULE 4. PROCESS

(a)-(b) identical to Mass.R.Civ.P. Rule 4 (a)-(b).

(c) **By Whom Served.** Except as otherwise permitted by paragraph (h) of this rule, service of all process shall be made by a sheriff, by his deputy, or by a special sheriff; by any other disinterested person; by any other person duly authorized by law; by some person specially appointed by the court for that purpose; or in the case of service of process outside the Commonwealth, by an individual permitted to make service of process under the law of this Commonwealth or under the law of the place in which the service is to be made, or who is designated by a court of this Commonwealth. A subpoena may be served as provided in Rule 45. Notwithstanding the provisions of this paragraph (c), wherever in these rules service is permitted to be made by certified or registered mail, the mailing may be accomplished by the party or his attorney.

(d) **Summons: Personal Service Within the Commonwealth.** The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) The defendant, whether within or without the Commonwealth, may accept personal service by written endorsement of his duly notarized acceptance of service on the summons or other process. In the event that service is not so accepted, service shall be made as set forth hereafter:

(2) Upon an individual by delivering a copy of the summons and of the complaint to him personally.

In complaints seeking establishment of paternity or for support of a child born out of wedlock, complaints for support of a spouse or child under Chapter 209, § 32F, for actions under Chapter 209D, for contempt and complaints for modification only, upon an individual:

(i) by delivering a copy of the summons and complaint to him personally,
or

(ii) by leaving a copy of the summons and complaint at his last and usual place of abode and by mailing copies thereof to the defendant. Notice under this subsection shall be proved by affidavit containing a particular statement thereof.

(3) If the person authorized to serve process makes return that after diligent search he cannot find the defendant, or if it appears that a defendant resides outside of the Commonwealth or is of parts unknown, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(4) If personal service shall not be made as aforesaid, such notice in the form ordered by the court shall be served by publishing a copy of the said notice ~~thereof one in each of three successive~~ *once* weeks in some newspaper designated by the Register or the court and by mailing a copy of such notice by registered or certified mail, if practicable, to the defendant at his last known address. The defendant shall file his answer or other responsive pleading within the time periods allowed under these rules computed as if the date of ~~last~~ publication were the date on which personal service was made.

(5) Service of publication and mailing shall be proved by affidavit containing a particular statement thereof, accompanied by a copy of the advertisement (or tear sheet) of the newspaper containing the ~~last~~ publication and, if practicable, by the return receipt showing receipt of a copy sent by registered or certified mail.

(6) The court shall require proof of actual notice when practicable. If such notice is not shown to have been received by the defendant, the complaint shall not be assigned for hearing until the expiration of three months after the ~~last~~ publication date, date of service at a last and usual place of abode, or date of a mailing to the last know address of the defendant if such service has been ordered by the court. Nothing in this rule shall prevent hearing of a motion for temporary orders or issuance of temporary orders prior to the expiration of three months, provided notice of the motion and hearing has been mailed to the defendant's last and usual place of abode in accordance with Rules 5 and 6.

(7) [Deleted].

(e) identical to Mass.R.Civ.P. Rule 4(e).

(f) **Return.** The person serving the process shall make proof of service thereof in writing to the court promptly and in any event within the time during which the person served must respond to the process. The person making return of service shall state in his return of service that a copy of the summons and complaint was delivered by him in hand to the defendant and shall further state the date on which and the place where such service was made. If service is made by a person other than a sheriff, deputy sheriff, or special sheriff, he shall make affidavit thereof. Proof of service outside the Commonwealth may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Commonwealth, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee or such other evidence of personal delivery to the addressee as may be

satisfactory to the court. Failure to make proof of service does not affect the validity of the service.

(g)-(h) identical to Mass.R.Civ.P. 4(g) and (h).

(i) [Deleted].

(j) identical to Mass.R.Civ.P. 4(j).

Reporter's Notes - 2009

Rule 4(d)(4) was amended to reduce the number of times notice must be published. This change is consistent with the probate rule requirement and will be more cost effective for litigants.

Rule as amended:
Old language struck through, new language in italics

Mass.R.Dom.Rel.P.

Rule 56. SUMMARY JUDGMENT

(a) Motions for Summary Judgment. A party may move for summary judgment subsequent to the commencement of any proceeding under these rules ~~in actions for modification and actions to modify or enforce a foreign judgment~~ *except in actions for divorce or in actions for custody or visitation or for criminal contempt*. Each motion for summary judgment shall be accompanied by an "Affidavit of Undisputed Facts" which shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, answer to interrogatories, admission or other document relied upon to establish that fact. The motion shall be served at least ten (10) days before the time fixed for the hearing. The moving party shall be responsible for filing with the Court all evidentiary documents cited in the moving papers. The motion for summary judgment shall be denied if the moving party fails to file and serve the affidavit required by this paragraph.

(b) Opposition. Any party opposing a motion for summary judgment shall file and serve no later than three (3) days before the time fixed for the hearing, unless the court otherwise orders, an affidavit using the same paragraph numbers as in the "Affidavit of Undisputed Facts" and admit those facts which are undisputed and deny those which are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, answers to interrogatories, admission or other document relied upon in support of the denial. The opposing party may also file a concise "Affidavit of Disputed Facts," and the source thereof in the record, of all additional material facts as to which there is a genuine issue precluding summary judgment. The opposing party shall be responsible for the filing with the court of all evidentiary documents cited in the opposing papers. If a need for discovery is asserted as a basis for denial of the motion, the party opposing the motion shall provide a specification of the particular facts on which discovery is to be had or the issues on which discovery is necessary.

(c) Stipulated Facts. All interested parties may jointly file a stipulation setting forth a statement of stipulated facts to which all interested parties agree. As to any stipulated facts, the parties so stipulating may state that their stipulations are entered into only for the purposes of the motion for summary judgment and are not intended to be otherwise binding.

(1) In any pending motion for summary judgment, the assigned judge may order the parties to meet, confer and submit, on or before a date set the assigned judge, a joint statement of undisputed facts.

(d) [deleted] [Case Not Fully Adjudicated on Motion].

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in any affidavits shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered

against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the responsible expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Judgment. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment, when appropriate, may be rendered against the moving party.

Reporter's Notes 2009

The amendment will allow for summary judgment in all cases exclusive of divorce actions, actions for custody or visitation or actions for criminal contempt.

Rule as amended:

Old language struck through, new language in italics

Rule 410. Mandatory Self Disclosure

(a) Initial Disclosures.

(1) Except as otherwise agreed by the parties or ordered by the court, each party to a divorce action, each party to a complaint for separate support, and each parent who is a party to an action under Chapter 209C that includes a claim for child support where paternity has already been adjudicated or where the parents have completed a notarized voluntary acknowledgment of paternity shall deliver to the other party or parties within 45 days from the date of service of the summons the following documents:

(a) The parties' federal and state income tax returns and schedules for the past three (3) years and any non-public, limited partnership and privately held corporate returns for any entity in which either party has an interest together with all supporting documentation for tax returns, including but not limited to W-2's, 1099's 1098's, K-1, Schedule C and Schedule E.

~~(b) Statements for the past three (3) years for all bank accounts held in the name of either party individually or jointly, or in the name of another person for the benefit of either party, or held by either party for the benefit of the parties' minor child(ren):~~

(c) ~~(b)~~The four (4) most recent pay stubs from each employer for whom the party worked.

~~(d)~~(c) Documentation regarding the cost and nature of available health insurance coverage.

~~(e) Statements for the past three (3) years for any securities, stocks, bonds, notes or obligations, certificates of deposit owned or held by either party or held by either party for the benefit of the parties' minor child(ren), 401K statements, IRA statements, and pension plan statements for all accounts listed on the 401 financial statement:~~

~~(f) Copies of any loan or mortgage applications made, prepared or submitted by either party within the last three (3) years prior to the filing of the complaint:~~

~~(g) Copies of any financial statement and/or statement of assets and liabilities prepared by either party within the last three (3) years prior to the filing of the complaint for divorce:~~

(2) The parties shall supplement all disclosures as material changes occur during the progress of the case. No party required to deliver documents under this Rule shall be permitted to file any discovery motions prior to making the initial disclosure as described herein, and no party to a divorce or separate support action shall be permitted to file any discovery motions prior to making both the initial and the additional disclosures as described herein.

(2) Except as otherwise agreed by the parties or ordered by the court, each party to a divorce action and each party to a complaint for separate support shall also deliver to the other party within 45 days from the date of service of the summons the following documents:

(a) Statements for the past three (3) years for all bank accounts held in the name of either party individually or jointly, or in the name of another person for the benefit of either party, or held by either party for the benefit of the parties' minor child(ren).

(b) Statements for the past three (3) years for any securities, stocks, bonds, notes or obligations, certificates of deposit owned or held by either party or held by either party for the benefit of the parties' minor child(ren), 401K statements, IRA statements, and pension plan statements for all accounts listed on the 401 financial statement.

(c) Copies of any loan or mortgage applications made, prepared or submitted by either party within the last three (3) years prior to the filing of the complaint.

(d) Copies of any financial statement and/or statement of assets and liabilities prepared by either party within the last three (3) years prior to the filing of the complaint.

(b) Additional Disclosures.

(1) Except as otherwise agreed by the parties or ordered by the court, each party to an action under Chapter 209C that includes a claim for child support where paternity has already been adjudicated or where the parents have completed a notarized voluntary acknowledgment of paternity may serve on a parent who is a party to the action a separate written request entitled "Request for Additional Rule 410 Documents," and the parent served shall, within 45 days from the date of service of the request, deliver to the other party or parties the documents set out in (a)(2)(a)-(d) above.

(2) When a request for child support is first added to an action under Chapter 209C by counterclaim or by amendment of the complaint, a party may serve on a parent who is a party to the action a separate written request entitled "Request for Rule 410 Documents," and the parent served shall, within 45 days from the date of service of the request, deliver to the other party or parties the documents set out in (a)(1)(a)-(c) above.

(3) The parties shall supplement all disclosures as material changes occur during the progress of the case. No party required to deliver documents under this Rule shall be permitted to file any discovery motions prior to making the initial disclosure as described herein, and no party to a divorce or separate support action shall be permitted to file any discovery motions prior to making both the initial and the additional disclosures as described herein.

(c) Unavailability of Documents. In the event that any party required to deliver documents under this Rule does not have any of the documents required pursuant to this Rule or has not been able to obtain them in a timely fashion, he or she shall state in writing, under the penalties of perjury, the specific documents which are not available, the reasons the documents are not available, and what efforts have been made to obtain the documents. As more information becomes available there is a continuing duty to supplement.

Reporter's Notes - 2009

The amendment provides for two prongs of document disclosure. The first prong requires automatic exchange of pay stubs, tax returns and health insurance information within 45 days of service of a complaint or counterclaim for establishment of child support. Second prong documents are produced only upon the serving of a Rule 410 notice for request of these documents.

New Rule

Probate Court Rules

RULE 27C. SUMMARY JUDGMENT PROCEDURE

Each motion for summary judgment shall be accompanied by a concise statement, in consecutive numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, admissions and affidavits, and a statement of the legal elements, with citations to supporting law, of each claim upon which summary judgment is sought. Failure to include the foregoing statements shall constitute grounds for denial of the motion.

Each opposition to a motion for summary judgment shall include a response, using the same paragraph numbers, to the moving party's statement of facts as to which the moving party claims there is no genuine issue to be tried, in consecutive numbered paragraphs, a concise statement of any additional material facts as to which the opposing party contends there is a genuine issue to be tried, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, admissions and affidavits, and in the event the opposing party disagrees with the moving party's statement of the elements of the claims as to which summary judgment is sought, a statement of the legal elements, with citations to supporting law, of each claim upon which summary judgment is opposed.

For purposes of the motion for summary judgment, facts contained in a statement described in the first paragraph hereof shall be deemed to have been admitted unless controverted in the manner set forth in the second paragraph hereof.

The statements filed by the moving party and opponent shall be accompanied by copies of all cited portions of documents referred to in those statements.

It shall be the responsibility of the parties to cooperate and file with the motion papers a single combined set of those exhibits, documents, transcripts and other things relied upon by all parties, in order thereby to avoid the filing of duplicate or multiple copies of the same things. In this process, the parties ought not over-designate materials and thereby burden the court. Further, however, within the spirit of the foregoing, no request for the inclusion of materials shall be denied by the party assembling the record.

The court need not act on any motion for summary judgment unless the parties have complied with the requirements of this procedure.

Reporter's Notes 2009

The adoption of this new Rule specifies the mandatory format to be used for supporting documents in summary judgment proceedings in the Probate and Family Court.